IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

NO. 283

UNITED STATES OF AMERICA EX REL.,
GEORGE ROBERT BROWN, *Respondent*,

vs.

WARD LANE, as Warden of the Indiana State Prison,
Petitioner.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *United States ex rel. George Robert Brown* v. *Lane* (1962), 302 F.2d 537. It is reprinted in full as an appendix to this petition.

The opinion of the United States District Court is reported as *United States ex rel. George Robert Brown* v. *Lane* (1961), 196 F. Supp. 484. It is reprinted in full in the nine (9) copies of the record filed with this petition pursuant to Supreme Court Rule 23 (i).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1962.

No petition for rehearing was filed.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This Court's jurisdiction over this petition for certiorari is conferred by Title 28, Section 2101 of the United States Judicial Code, which authorizes this Court to grant certiorari to review judgments of United States Courts of Appeal on petitions filed within ninety (90) days from the date of entry of such judgment.

THE QUESTION PRESENTED

The sole question presented is:

> 1. Did the District Court and the Court of Appeals err in finding that respondent herein, an indigent, had been denied due process and/or equal protection of law under the fourteenth amendment to the United States Constitution because the State of Indiana conditioned his right to appeal from a denial of his writ of error coram nobis upon a determination of his appeal's merit by the public defender?

THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision involved in this appeal is: the Fourteenth Amendment, Section 1, to the United States Constitution.

> 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citi-

zens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana Public Defender Act reads in relevant part as follows:

2. Ind. Acts 1945, Ch. 38, Sec. 1 as found in Burns Indiana Statutes 13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

3. Ind. Acts 1945, Ch. 38, Sec. 2 as found in Burns Indiana Statutes 13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is, without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

4. Ind. Acts 1945, Ch. 38, Sec. 5 as found in Burns Indiana Statutes 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any

prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

Rule 2-40 of the Indiana Supreme Court, rgads as follows:

5. "An appeal may be taken to the Supreme Court from a judgment granting or denying a petition for a writ of error coram nobis. The sufficiency of the pleadings and of the evidence to entitle the petitioner to a vacation of the judgment will be considered upon an assignment of error that the finding is contrary to law. The transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the clerk of the Supreme Court within ninety (90) days after the date of the decision. The provisions of the rules of this court applicable to appeals from final judgments shall govern as to the form and time of filing briefs. All proceedings in the lower court shall be stayed until the appeal is determined, but no petitioner shall be entitled to bail if the petition is granted, after the state serves notice that an appeal will be prosecuted, by filing written notice thereof with the court in term or judge in vacation. If a judgment vacating the original judgment be affirmed on appeal, or no appeal be prosecuted within the time herein limited, the petitioner shall be entitled to bail under the same conditions an offense may be bailable before trial. The petitioner, or the state shall be entitled to a change of judge for the same causes and under the same procedure provided in civil actions."

CONCISE STATEMENT OF THE CASE

A.

NATURE OF THE CASE AND ITS DISPOSITION IN THE DISTRICT AND APPELLATE COURTS.

This action commenced as a Petition for Writ of Habeas Corpus brought on July 19, 1961, by Respondent, to contest the legality of his detention in the Indiana State Prison by Warden, Ward Lane. Petitioner was ordered by the District Court to show cause on or before July 25, 1961, why the writ should not issue. Hearing was held on July 26, 1961, and after oral argument the District Court found in a written opinion that Respondent had been denied equal protection of the laws of the State of Indiana, and ordered a full appellate review of Respondent's Coram Nobis denial by the State of Indiana within ninety (90) days of the date of that Court's order; and, further, ordered a stay of Respondent's execution.

It appearing that no action had been taken by the State of Indiana to comply with the District Court's July 26, 1961, determination, the District Court on November 10, 1961, ordered Petitioner to show cause why Respondent should not be released at a hearing to be held November 16, 1961. After hearing, the District Court issued its order granting Respondent's Writ of Habeas Corpus, but remanded Respondent back to the custody of Petitioner.

Petitioner perfected an appeal to the Seventh Circuit Court of Appeals. That Court affirmed the decision of the District Court on May 4, 1962, and ordered Respondent to be detained in custody until the time for filing a petition for certiorari should have expired, and if such petition

should be filed and granted, until the Supreme Court of the United States has made final disposition of the case.

PETITION FOR WRIT OF HABEAS CORPUS

This cause was initiated in the District Court by the filing of a verified Petition for Writ of Habeas Corpus. The petition alleged that Respondent was tried, and convicted, of MURDER IN THE PERPETRATION OF ROBBERY and sentenced to death in the Lake County Criminal Court and his Motion for New Trial was overruled in February, 1958. Respondent perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed.

Thereafter, a Petition for a Writ of Certiorari was denied by the Supreme Court of the United States. In February, 1960, Respondent sought a Writ of Habeas Corpus in the District Court for the Northern District of Indiana. Said petition was dismissed for failure to exhaust State remedies. Respondent then sought a Writ of Error Coram Nobis in Lake County, Indiana Criminal Court. The Indiana Public Defender appeared on behalf of Respondent in this proceeding. After a hearing, the writ was denied by the Lake County Court. Respondent sought an appeal from this denial and having been unsuccessful in eliciting the support of the Public Defender, filed a motion in the Lake County Court to appoint counsel and furnish the transcript of record. The Lake County Court denied this motion in July, 1960. Respondent thereupon filed a Verified Petition for a Writ of Mandate in the Indiana Supreme Court praying that Court to direct the Lake County Court to appoint him counsel and furnish him a transcript. This petition was denied by the Indiana Supreme Court in

February, 1961. Respondent filed a Writ of Certiorari in the United States Supreme Court in March, 1961. This petition was denied in June, 1961, without prejudice to his application for a Writ of Habeas Corpus in the appropriate United States District Court. Whereupon Respondent filed a Petition for Writ of Habeas Corpus in the District Court on July 19, 1961.

Respondent's writ was based on five grounds. The only ground that is before this Court is Ground Five (5), as that is the basis of the District and Appellate Courts' decisions. That is that Respondent has been denied equal protection of the law, in that he was effectively denied an appeal from the order of the Lake County, Indiana Criminal Court, because of his poverty and inability to secure a transcript, which right of appeal is available to all defendants in Indiana who can afford the expense of a transcript.

The District Court had jurisdiction to entertain Respondent's Petition for Writ of Habeas Corpus under authority of Title 28, U.S.C.A., § 2241.

REASONS FOR ALLOWANCE OF THE WRIT

Rule 19(a) of the Supreme Court of the United States indicates that one of the considerations, which this Court weighs in deciding whether to grant a writ of certiorari, is where a Federal Appellate Court has decided an important state question in conflict with applicable State law.

The decision of the Court of Appeals for the Seventh Circuit (see Appendix), and the District Court decision (see Appendix filed in Seventh Circuit), are in direct conflict with the decisions of the Supreme Court of Indiana.

In *Brown* v. *State* (1961), — Ind. —, 171 N. E. (2d) 825, 827, the Supreme Court of Indiana stated:

> "We therefore conclude that if, as it appears in this case, a belated proceeding in error coram nobis has been had and adjudged against a convicted defendant, and the public defender, who is a former jurist and an eminently qualified trial lawyer, has made a careful review of the proceedings on behalf of such defendant, and has determined that he is 'unable to find any error or errors that would have any merit to assign upon an appeal,' and so advises the convicted defendant, the state has thereby afforded to the defendant every reasonable guarantee of due process as contemplated by the Constitution of the United States and of the State of Indiana. U. S. Const. Amend. 14; Const. art. 1, § 12."

In *Willoughby* v. *State* (1961), — Ind. —, 177 N. E. (2d) 464, 471, the Supreme Court of Indiana stated:

> "We are keenly aware that equal protection must be given to all citizens by our courts in so far as this is possible. However, it is not contemplated that every convicted criminal without means be furnished at public expense with a transcript of his trial, as a personal memento to him of his latest escapage [sic] against society, nor is it contemplated that such a record be provided for the entertainment of the convicted criminal and his fellow inmates merely because the statute [§ 4-3511, supra] provides that he is entitled to such a record. The legislature, by this enactment, did not contemplate that the state should be required to expend public funds for appeals which are obviously frivolous and therefore futile. Neither is it reasonable to contend that this court should be required to give its time and consideration to the formality of such spurious appeals, which, under a different ruling, could be required in every pauper

case. The expense of such a record can be justified only on the ground that it be made available for the purpose of an appeal from a conviction, in which there is some probable cause for reversal.

"The above conclusion is consistent with the fundamental principles that: (1) there is no presumption of error in the trial court, Campbell v. State, Ind. 1960, 169 N. E. 2d 604; and (2) public funds are not to be spent without some valid reason. See Hamilton v. Baker, Judge, etc., 1955, 234 Ind. 283, 126 N. E. 2d 12. Upon this subject, Mr. Justice Frankfurter of the Supreme Court of the United States stated the controlling principles of law in the case of Griffin v. Illinois, 1955, 351 U. S. 12, 24, 76 S. Ct. 585, 593, 100 L.Ed. 891, as follows:

> "'When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.'"

"See also: McCrary v. State, supra [Ind. 173 N. E. 2d 300]; Brown v. State, Ind. 1961, 171 N. E. 2d 825; State ex rel. Casey v. Murray, supra [231 Ind. 74, 106 N. E. 2d 911]; State ex rel. Pappas v. Baker, Judge, 1935, 209 Ind. 25, 197 N. E. 912; Indiana Law Journal Vol. 36, p. 237.

"From common experience we know that a convicted defendant, who is financially able to do so, and therefore required by law to pay the costs of appeal, would not incur such costs against the advice of counsel who could find no error as cause for appeal unless, of

course, such convicted defendant had personal knowledge of some specific error which he could *pro se* present to this court, contrary to the advice of counsel. By the same logic it is not reasonable to contend that equal protection under the law requires that the state must pay the cost of appeal for a poor person against the advice of counsel and in the absence of any showing of probable cause for appeal, merely because the convicted person is an indigent.

"Under our law which affords every accused person the right of asserting every available defense by competent counsel, with the opportunity (as in this case) of judicial review by this court over the action of such counsel, the state of Indiana has afforded to indigent defendants and non-indigent defendants alike, insofar as is reasonably possible, equal protection under the law in both the trial courts and on appeal."

The decisions in Indiana run directly contrary to the decisions of the Appellate and District Courts.

The resolution of this question is extremely important to the State of Indiana, as it casts a shadow over their entire post conviction appeal procedure. The Supreme Court of Indiana feels quite strongly that the procedure adopted by Indiana for allowing indigents appeals from a denial of a post conviction remedy, does not deprive the indigents of their constitutional rights as protected by the Fourteenth Amendment to the United States Constitution.

The Federal Courts have just as strongly held that the procedure works a deprivation to the constitutional rights of indigents.

If the Federal Courts are correct in their interpretation of the Constitution, then the effect in Indiana will be wide-

spread, as many indigents have been treated in the same manner as Respondent.

For the above reasons, Petitioner strongly urges that this honorable court grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 13583 SEPTEMBER TERM 1961—APRIL SESSION 1962

UNITED STATES OF AMERICA ex rel. GEORGE ROBERT BROWN,
Petitioner-Appellee,
v.
WARD LANE, as Warden of the Indiana State Prison,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

May 4, 1962

Before DUFFY, KNOCH and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* The matter before us is based upon a petition for a writ of habeas corpus filed by George Robert Brown, petitioner, who is under sentence of death imposed by the Lake County (Indiana) Criminal Court upon a conviction of murder in the perpetration of robbery. The District Court granted the petition and issued the writ.

After petitioner was convicted in the State court, he filed a motion for a new trial which was denied. He perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed. A petition for a writ of certiorari was denied by the United States Supreme Court.

In February 1960, petitioner sought a writ of habeas corpus in the United States District Court for the Northern District of Indiana. It was dismissed for failure to exhaust state remedies. Petitioner then sought a writ of error *coram nobis* in the State court where he had been convicted. The Indiana Public Defender appeared in behalf of petitioner in this proceeding. After a hearing, the writ was denied.

Petitioner sought an appeal from this denial. He asked the support and help of the Public Defender who declined. He filed a motion in the Lake County Criminal Court to appoint counsel for him and to furnish the transcript of record. This motion was denied. Petitioner thereupon filed a verified petition for a writ of mandate in the Indiana Supreme Court asking that Court to direct the Lake County Criminal Court to appoint counsel and to furnish him a transcript. This petition was denied by the Indiana Supreme Court in February 1961. Petitioner then filed a petition for a writ of certiorari in the United States Supreme Court in March 1961. This petition was denied in June 1961, but without prejudice to his application for a writ of habeas corpus in the appropriate United States District Court. Whereupon petitioner filed a petition for a writ of habeas corpus in the United States District Court in July 1961, and it is from the order granting the writ that the instant appeal originates.

A hearing was held before the District Court on July 26, 1961. Thereafter the District Court handed down a written opinion[1] holding that petitioner had been denied equal protection of the laws by the State of Indiana, and ordered a full appellate review of petitioner's *coram nobis* denial by the State of Indiana within ninety days of the date of that Court's order. No action was taken within that period by the State of Indiana, and on November 10, 1961, the District Court ordered respondent to show cause why petitioner should not be released, at a hearing to be held November 16, 1961. After a hearing on that date, the District Court issued its order granting petitioner's writ of habeas corpus, but remanding petitioner to the custody of respondent Warden, pending this appeal.

[1] Printed in 196 F. Supp. 484.

The Public Defender stated his reasons for refusing to represent petitioner in perfecting an appeal to the Indiana Supreme Court from the order of the trial court overruling and denying his *coram nobis* petition. He said, in a letter:

> "After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judgment denying your Petition for Writ of Error Coram Nobis.
>
> "I have talked to the Chief Deputy Attorney General and he informed me that in the event my office refuses to perfect an appeal for you and if you are a pauper, and allege these facts in any petition you file in the Federal Court, the Attorney General will concede that you have exhausted your state remedies. I have no authority to appear for you in the Federal Court but I believe the Federal Judge might appoint counsel for you.
>
> "Due to the above facts, I am closing my file on your case."

The Indiana Public Defender statute is found in Burns Indiana Statute (1956 Repl.) Section 13-1401 to 13-1406 and reads in part as follows:

> 13-1401:
> "There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the state of Indiana to serve at the pleasure of said court, for a term of four [4] years. . . ."
>
> 13-1402:
> "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

It is clear from the decisions of the Indiana Supreme Court that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy such as *coram nobis*, he must first obtain the assistance of the Public Defender. A prisoner is not entitled to a transcript of the record at public expense, unless he obtains same through the Public Defender. *State ex rel. Casey* v. *Murray*, 231 Ind. 74, 106 N.E. 2d 911. Also, the Public Defender is given wide discretion in deciding whether the matters complained of present any appealable issue. *Jackson* v. *Reeves*, 238 Ind. 708, 153 N.E.2d 604.

The effect of the statute as interpreted by the Indiana Supreme Court is that a defendant who can afford to pay for a transcript can perfect an appeal, but an indigent defendant, in order to perfect an appeal, must first secure the aid of the Public Defender, and if the latter declines, a transcript will be denied. This results in an indigent defendant being denied appellate review because Indiana Supreme Court Rule 2-40[2] requires that a "transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the Clerk of the Supreme Court. . . ." The Supreme Court of Indiana has ruled that the presence of a transcript is jurisdictional to it. *McCrary* v. *State* (1961), ... Ind. ....., 173 N.E.2d 300, 305-307.

The petitioner herein was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase

[2] Ind. Sup. Ct. 1968 Ed., Rule 2-40.

a transcript of the record. Without such transcript the Supreme Court of Indiana would not assume jurisdiction.

In *Griffin et al.* v. *Illinois* (1956), 351 U.S. 12, the Supreme Court stated the issue therein as follows (p. 13): "The question presented here is whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others."

In *Griffin*, the Supreme Court further stated (p. 18): "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." The Court said further (p. 19): "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The rule announced in *Griffin* was reaffirmed in *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214. The *Eskridge* case is similar in many respects to the case at bar. The Constitution of the State of Washington gave the accused in a criminal prosecution a right to appeal in all cases. A Washington State law authorized the furnishing of a transcript to an indigent defendant at public expense if, in the opinion of the trial judge "justice will thereby be promoted." The trial judge in *Eskridge* found that justice would not be promoted and a transcript was not furnished. The United States Supreme Court stated (p. 216): "We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that, '[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.'"

It is true that in each of the *Griffin* and *Eskridge* cases, a direct appeal from a conviction was involved. However, from the language used by the Supreme Court we cannot conceive that a different yardstick would be applied on an application for a writ of error *coram nobis*, an Indiana post-conviction right.

In *Smith* v. *Bennett* (1961), 365 U.S. 708, the Supreme Court held that an Iowa statute which required an indigent prisoner of the State to pay a filing fee before a writ of habeas corpus would be docketed, denied the prisoner the equal protection of the laws in violation of the Fourteenth Amendment. The Court said (p. 709): "We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."

We think the Supreme Court in *Smith* v. *Bennett* effectively disposed of the contention that the rule stated in *Griffin* and *Eskridge* is not applicable to the case at bar because a direct appeal from a criminal conviction is not involved. The Court said (p. 712): ". . . In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action. . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels."

We hold the District Court was correct in determining the State of Indiana denied petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The Court acted within its discretion in requiring a full appellate review of petitioner's *coram nobis* denial within a period of ninety days. The State of Indiana chose to ignore this order. The District Court was left with no alternative but to order petitioner's discharge from custody, but under the circumstances, properly ordered that he be detained in the custody of the warden pending the appeal to this Court.

We direct that petitioner continue to be detained in the custody of the warden during that period during which a petition for certiorari may properly be filed with the Supreme Court of the United States to review the decision of this Court, and if such a petition be granted, then for such period of time until the United States Supreme Court has made final disposition of this case. An order for a stay of execution for the same period will be entered. Thereafter, the United States District Court may enter an order of final disposition.

We wish to acknowledge the services in this Court of Nathan Levy, Esquire, of South Bend, Indiana. His services were painstaking and his brief very helpful.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.